

Joyce Vance:

Welcome back to #SistersInLaw. I'm Joyce Vance. Jill is off on a well-deserved vacation this week. We hope you're having a great time, Jill. I know you're listening. This week, we'll be looking at the January 6th commission and the difficult task of separating politics from the process, the indictment of Tom Barrack and two new policies at DOJ, one for investigations that involve members of the press and also communications with the White House.

Joyce Vance:

And as always, we'll be answering some of your questions at the end of the show. But the first thing I want to do to start up off this week is to follow up on last week's chit-chat, because, Barb, you asked our listeners for ideas about dealing with items that come up in text messages that require future actions, and how we can get inundated with them and have no way of keeping a top of everything. A lot of our listeners reached out to us on social media, I even got emails. Did you get any definitive solutions to your problem?

Barb McQuade:

I did, Joyce. I got so many responses. It was really heartening to see. I got emails, I got tweets, direct messages and replies on Twitter, which is so heartening. And I think all of us try to stay on top of being organized and utilizing technology. So it's always great to hear some tips.

Barb McQuade:

So I'll share with you three of the best ideas I heard for following up on text messages. One is to pin the text. All you need to do is hold down in the text and a menu of options comes up. One of which is to pin the text, which will push it to the top of your message list until you unpin it by doing the same thing and choosing unpin. So that's a good one and an easy one.

Joyce Vance:

I had no idea about that. That's amazing.

Barb McQuade:

Yeah. So I like that one. I've been trying all of these. The other is to take a screenshot of the message and email the screenshot to yourself. In fact, one listener said he does it with all kinds of things that he needs to know, photos, calendar entries, text messages, all kinds of things. He sends them to himself, and then at the end of the day goes back and kind of cleans house and gets organized with that. So I liked that one.

Barb McQuade:

And then the other is to just copy the content of the text and put them in an email and send it to yourself so that it's all there in your email and you can flag it or however you want to do it. So I'm going to try all three and I really appreciate the suggestions for our listeners.

Joyce Vance:

I'm so glad you raised that, because I would have been too embarrassed to admit that that was really a difficult situation. I thought it was just me. I guess this highlights that if you're having a problem, probably everyone else's, too. So this week, we all did something, or really in the last two weeks, we've

all done something that I think is on a lot of people's minds right now. We've all traveled. We've all gotten onto airplanes and flown or gone to cities that are different to ones we live in.

Joyce Vance:

And that's a little bit fraught right now, to be honest, with where we are in the pandemic. My best friend was over for lunch today and we were talking about how our expectation was we would get the vaccination and then, like magic, everything would be normal again, but it's not quite that easy. I was pretty comfortable, we flew to Maine to visit our daughter. We wore masks on the airplane. It was a Delta flight. Everybody was very compliant. There weren't any problems. What were your travel experiences like? Did everything go all right?

Kimberly Atkins Stohr:

Yes. So as we speak right now, I am actually in Boston. I came to Boston for a conference where I spoke. And I... It's been a mixed bag. The conference itself had decided to have a mask mandate when we weren't eating or drinking. They asked for people within the conference rooms to keep their masks on. Or speaking, I took mine off to speak and then I put it back on.

Kimberly Atkins Stohr:

But when we walked into the hotel where it was being held, nobody in the lobby, none of the hotel workers, nobody had masks on. And it was kind of like, "Oh, okay." It's unusual. I'm still getting used to being in indoor spaces where the majority of the people aren't masked. I am vaccinated, we talked about that, we all are, but there's still... I feel like this week, we're still learning so much about what we don't know about vaccinations. We know that there are breakthrough cases. If we catch it, it may not land us in the hospital, but we don't know if we might spread it to someone else.

Kimberly Atkins Stohr:

And so my mantra in going out into this brave new world again is I don't want to be the jerk, right? So whatever we do, we don't know. If putting on a mask decreases the chances that I may catch a breakthrough case, if it decreases the chance, certainly. If I could pass it on to someone else, I just never would want to do that. I'm just going to put a mask on and I'm going to stay or stay a little further away from people who I don't know also to be vaccinated or who are in my own household.

Kimberly Atkins Stohr:

It's not a big deal to me, and I don't mind if I'm in a space and I'm wearing a mask and nobody else's. The one funny thing that will happen is if I'm on an elevator or something, and I have my mask on, someone else will get in and they'll say, "Oh my God, am I supposed to wear a mask? And I was saying, "No, I'm just being careful." So people do, at least some people seem to be conscious of it and they want to do the right thing and follow the rules. But I have to tell you, it's weird. It's weird.

Barb McQuade:

I'm not used to it yet. Am I the only person in America who actually likes wearing a mask?

Joyce Vance:

I think that they're great. My allergies have been so much better. And in the last few weeks, as I've taken mine off, my allergies are actually bad again.

Barb McQuade:

It improves my looks, number one. So get that going for you. And, don't know, I just feel safer with it. I too traveled. My daughter and I went to New York City last weekend and we wore masks at the airport. We wore masks on the plane. There were a number of places we went that asked people to wear masks even if you were vaccinated.

Barb McQuade:

And in light of the breakthrough cases, in light of the fact that young children can't get vaccinated and anything, even those of us who are vaccinated could be carriers even if we get asymptomatic cases or very mild symptoms. I don't want to be a carrier for the virus, so I'm very happy to wear a mask. But I know I may be in the minority in that. My husband doesn't like wearing masks because it steams up his glasses and I can see how that[crosstalk 00:06:38].

Kimberly Atkins Stohr:

It does. It does. I can attest to that. I thought it was a very interesting and really moving, speaking again of Alabama, Joyce, when Governor Kay Ivey really implored people in that state who are not vaccinated yet to get vaccinated. But she also expressed exasperations saying she can't force people to take good care of themselves.

Kimberly Atkins Stohr:

And I just hope that, regardless of anyone's political leanings, regardless of where people live, and I know we all want to get back to normal, the way things were, that it just... Wearing a mask is so simple at the very least. If you're not vaccinated, I really hope that you get vaccinated. But wearing a mask is so simple. I hope people do that just to get us through this variance so that we really can get on the other side.

Joyce Vance:

I think that's really where we are right now. We're at a point where we just need to recognize public health and politics are two different things. And we need to all engage on being smart. I like Kim's phrasing of it, don't be the jerk. We need to all do smart things for public health.

Joyce Vance:

But listen, if any of our readers have great tips about travel, particularly as folks embark on late-summer vacations, or like my family, if you're getting ready to take a kid off to college, we'd love to hear your tips. So please share them with us on social media, tweet them, DM them throughout the week. That would be great.

Joyce Vance:

That takes us to our first topic for today. We are as incredible as it is more than six months out from the events of January 6th. Kim, were you going to lead us through a discussion of where we are on the post January six investigation events?

Kimberly Atkins Stohr:

Yes. So this week, a Florida man became the first Capitol riot defendant to be sentenced for a felony charge. Paul Hodgkins, who is 38 and from Florida, as I said, was sentenced to eight months after he pleaded guilty last month to a single count of obstructing an official proceeding.

Kimberly Atkins Stohr:

Now, that sentence is less than the 15 to 21-month sentence he could have faced that was recommended at the time of his guilty pleas. So I want to start with Barb. Explain this sentence. And whether you think this downward departure was appropriate?

Barb McQuade:

Yeah. So Paul Hodgkin's was the first person convicted of a felony to be sentenced in the January 6th attack riot insurrection. He was convicted by guilty plea of one count of obstructing a joint session of Congress. And he was the one seeing carrying a red and white Trump 2020 flag into the well of the Senate chamber while other people stood around and watched him.

Barb McQuade:

And so when the judge is imposing a sentence in a case like this, he has to think not only about this case, but also about the other 500 or so cases that are going to be coming before courts for sentencing. They're obviously all presumed innocent until they're convicted, but they have to anticipate that other people will be convicted and think about where his person ranks and all of those things.

Barb McQuade:

So the first place that the judge would start would be with the sentencing guidelines, which looks at things like the nature of the offense and the characteristics of the offender, acceptance of responsibility. And that will create a sentencing guidelines range. And as you said, Kim, in this case, that was 15 to 18 months. But that guideline range is only advisory. The judge is then free to decide the appropriate sentence for the person before him and can go below or above that range.

Barb McQuade:

And in one factor that the sentencing statute requires is that the judge consider the need to avoid unwarranted disparities among similarly situated defendants. So in this case, this case is going to serve as sort of a baseline for others. In the real estate world, I think they refer to this as comparables. But you can bet, in every case after this, the defense will say that my client should get a downward departure, too, just like Mr. Hodgkins got because it's important to treat similar defendants similarly.

Barb McQuade:

The prosecution in this case asked for 18 months, which is the top of the guidelines range. And I have to say, I agree with that assessment. One of the factors, of course, supposed to consider is the importance of deterrence in a sentence to discourage other people from engaging in similar conduct in the future. And the prosecution argued this was an act of domestic terrorism. It was designed to subvert the election and the peaceful transfer of power through intimidation, and force, and violence.

Barb McQuade:

I would think 18 months is not at all a harsh sentence, if not even a little bit of a lenient sentence in light of the conduct. So I was surprised to see the judge go below the guidelines range from 15 months to 18

months. And I think that every other defendant who comes forward is going to cite this as part of its argument about why their client ought to receive a downward from the sentencing guidelines as well. \

Kimberly Atkins Stohr:

And what about that, Joyce? I mean not only, as Barb talked about, what it might mean how other defendants might be advised by their attorneys, but also to me, I'm wondering about defendants who might have thought about cooperating. If they think that the sentence isn't going to be that bad anyway, is it going to discourage them from cooperating and helping to build cases against some of the people who are organizing this?

Joyce Vance:

Yeah. First, I want to adopt everything that Barb said, because I think she is exactly on the money, both on how this happened and on whether it was the correct sentence or not. And one of the reasons it was not correct is really because of the impact it could have here. Although, Kim, it's actually really hard to know how defendants look at potential sentences for some people, the notion of spending a month in prison is too much. And others I've had white collar cases where defendants have been delighted to go off to prison for eight months or even a year, knowing that they made a couple million dollars.

Joyce Vance:

So people are motivated in all different ways in these situations, and it can be tough to predict. What I think the government's path forward, though, in future sentencing will be, is to distinguish Paul Hodgkin's conduct from that of other defendants. Because according to the government's position, he was not involved in violent. He was not even involved in property destruction. And the guidelines sentence here is driven by those factors.

Joyce Vance:

For instance, for a defendant who was involved in threatening to damage property or threatening violent, the guideline range, even for someone with no criminal history is much higher. It could be 41 to 51 months or going up from there. So if I'm the government, I'm telling future defendants in plea negotiations, listen, don't think you're going to get this same cakewalk, because you may very well find yourself in front of a different judge or with a very different guidelines assessment if your conduct is different.

Joyce Vance:

Something interesting that I've noticed in some of the cases that are coming down the pipeline, though, is that we have defendants who have entered into cooperation agreement with the government. Typically, if you have a cooperation agreement, you're going to get sometimes a pretty dramatic decrease in your sentence as a payoff for your cooperation. What we don't know is what are these defendants cooperating on. Is it other people similarly situated to them, the guy that they were in line with as they broke through into the Capitol or to some of these people possess information about what I would call leaders or organizers of the activity.

Joyce Vance:

That I think is one of the big unknowns. But I would expect the government to really stick to its guns here. They didn't get there 18 months in case. I don't think that that will keep them from asking again.

What we're seeing is a us attorney's office that is very disappointed in this sentence and very serious about getting sentences for these defendants that reflect their conduct.

Kimberly Atkins Stohr:

And we will keep an eye on what happens next with these defendants. But meanwhile, Joyce, this week, House Speaker Nancy Pelosi and Republican House leader, Kevin McCarthy, sparred over the January six special commission with a speaker Pelosi kicking off to GOP members and McCarthy threatening to create his own all-Republican panel. What's going on? What do you make of all of this?

Joyce Vance:

So it's horrible to think that we have leaders in our government who are less interested in learning the truth about January 6th and less interested in mitigating the threat of future events than they are in just playing this as political B roll. But I think, unfortunately, that that's where we are. And the speaker did the right thing here. I mean, she needs to refuse to see anyone who's involved in perpetuating the big lie, people who were complicit in January 6th or in the cover-up of January 6th, the coverup to the American people. They really don't need any more opportunity to cover up the truth.

Joyce Vance:

So I think she was correct to refuse to see these folks, not because I think there should be any politics involved in the January six commission, but for exactly the opposite reason. I think that the Democrats are going to have to work incredibly hard here to remove any stain of politics from these kinds of proceedings. They need to use professional staff as much as possible to conduct questioning, to work with witnesses and documents.

Joyce Vance:

And I'm going to make a radical suggestion here. I understand that, sometimes, committee proceedings are used to make, I know this will come as a shock to y'all, political points that can be played on their local TV stations the night of those hearings. I think it would really behoove the members of this commission to explicitly walk away from doing this sort of thing and to conduct themselves as a professional fact-finding body that's just there to get the truth, whatever it is.

Joyce Vance:

Look, there's some percentage of the American people that no matter what this committee finds, they will reject it, they are the hardcore Trump base, but I do believe that there's some possibility if the Democrats are really rigorously there. And if they tell that story to the American people, that what they're trying to do is just get to the truth, whatever it is, and come up with a set of good recommendations that better protects us in the future, then I think some people will be able to hear that. It's going to be very, very difficult for that to happen.

Kimberly Atkins Stohr:

Well, Barb, I want to go to you on that. Because from, not just a political standpoint, but from a legal standpoint, what do you see is the importance, the purpose of this commission and what could be at stake if whatever the ultimate findings are tainted, are least in the minds of some Americans for the politics and the invite?

Barb McQuade:

Well, I think like the 9/11 Commission, the purpose of this commission is to investigate, and chronicle, and analyze what happened so that we can learn from it and make necessary changes to prevent it from happening again. The 9/11 commission wrote an excellent report. I'm sure you've all read it. And it made really specific recommendations about how we organize our intelligence community, how we secure our border.

Barb McQuade:

And those are the kinds of things that I think need to be examined here so that we can make necessary changes. Why did we fail to collect the intelligence that seems to most of us to be staring us in the face? Why did we fail to share the intelligence to all the relevant law enforcement agencies? Why was the Capitol so severely understaffed to meet the challenge that day? Did anyone organize and fund the effort? What role did social media play? What role did the Trump administration play? And how do we get a handle on the threat of domestic extremism? I think all of those things are worth looking at.

Barb McQuade:

And as to the political infighting aspect of this, I know Kevin McCarthy, the House Majority Leader has said, I'm going to take my ball and go home if speaker Nancy Pelosi isn't going to permit him to have his five picks when she kicked off Jim Banks and Jim Jordan, members of Congress from Indiana and Ohio. But both of these are, I have already made it clear that their goal on this commission would be to sabotage the work of the commission.

Barb McQuade:

We know that Banks has said that he wanted to include Black Lives Matter protests as part of the scope of this commission. I mean, come on. Investigating Black Lives Matters protest and what happened, maybe that's a matter for Congress, I don't know, but it has nothing to do with what happened at the Capitol on January 6th. Jim Jordan has referred it says impeachment round three. And so they clearly are not taking it seriously. They both voted against certifying the election results on January 6th. They have both voted against the formation of a commission.

Barb McQuade:

These two people are part of perpetuating the big lie. And so keeping them off of the committee strikes me as an effort to encourage its integrity. And you talked about some of the prior investigations that they've done, the Benghazi investigation comes to mind is just a political spectacle.

Barb McQuade:

And and Joyce and I testified before the house judiciary committee a couple of years ago about the obstruction of justice findings by Robert Mueller in his investigation. And Jim Jordan was unbelievably unprofessional. He was someone who seemed to absolutely fit this description that you gave, Kim, about just creating footage for the evening news. And, Joyce, I think you used the term political B roll. Look at you, what an insider. What does that political B roll? I love it. Which is really just, I just want some footage of me taking it to to the libs, right? Owning the libs.

Barb McQuade:

And that is so disruptive, but it's so cynical about our government. There's a real need to do serious work here. And I think that Jim Jordan and Jim Banks have demonstrated that they are not up to the job. And so excluding them from this task seems to be striking a blow in favor of enabling this commission to do its work.

Kimberly Atkins Stohr:

That's a really important point because both Jordan and Banks, Speaker Pelosi made clear that their votes against certification were not the basis of them being excluded. It's their systematic repetition of misinformation and covering up for the horrific events that happened on that day that made it seem pretty clear, as Barb said, that they were unserious about the job that this commission is tasked with. So we will also keep an eye on that and see how, how that moves forward, because it is, as Barb said, really important that we understand all the elements that went behind that attack on our government that day.

Joyce Vance:

Kim, I know it's a little bit personal of a question, but I'm wondering if you're still wearing your ThirdLove bras. I'm really enjoying mine. And I've been very unhappy about having to get dressed up for work again and wearing stuff like hard bounds that I'm not used to wearing. But the ThirdLove bras are really comfortable. Are you still enjoying yours?

Barb McQuade:

Can trace it as so personal. I'm so glad I'm not participating in this one. Go ahead.

Kimberly Atkins Stohr:

Well, listen, people wear bras. It's a reality of life. And better they be comfortable than uncomfortable. Right? And I definitely feel that mine are very comfortable. I mean, the best thing about it is that I don't think about them when I have them on, because they are comfortable, nothing is pinching or feeling like I need to do something else. It's just... It's good. It's comfortable. And so I can put it out of my mind, which is the best thing for me when it comes to foundational garments.

Joyce Vance:

I think that's the highest compliment you could ever pay to a bra. Although I can see Barb sort of turning green on this one. But what our listeners can do is they can take the easy fitting room quiz that we took. And ThirdLove takes of everything else. They focus you're fit, your size, shape, current issues, and your personal style. And they deliver bras and underwear that are perfect for you. That's how it worked out for me.

Barb McQuade:

And with custom design bras, with half cups going from AA to I, signature memory foam, no slip straps, and scratch-free bands, plus amazing lounge wear, ThirdLove gives you the ultimate shopping experience. You'll find your new every-day essentials in their own new feather lace collection, or the number one rated 24/7 classic t-shirt bra. Get the style you deserve with ThirdLove bras, underwear, sleep, and lounge ware.

Joyce Vance:

They even give their gently used returned bras to women in need, donating over \$40 million in bras so far. ThirdLove knows you deserve to feel comfortable and confident 24/7. So right now they're offering our listeners 20% off their first order.

Barb McQuade:

So go to [thirdlove.com/sisters in law](https://thirdlove.com/sisters-in-law) now to find your perfect fitting bra. And get 20% off your first purchase. That's [thirdlove.com/sisters in law](https://thirdlove.com/sisters-in-law) for 20% off today. Look for the link in our show notes.

Joyce Vance:

While we've all been paying attention to criminal investigations going on in a number of places, whether it's side Cy Vance investigating and indicting Trump's CFO in New York and state court, whether it's the investigation going on into post-election influence peddling down in Georgia, but this week's entry was something of a surprise to me. It was the Eastern District of New York indicting longtime Trump buddy, Tom Barrack. Barb, do you want to help us understand what happened here?

Barb McQuade:

Yes. So, as you say, there was an indictment returned this week, charging Tom Barack and two others in a seven-count indictment with acting as an agent of a foreign government, conspiracy, obstruction of justice, and false statements to the FBI. He was arrested in Los Angeles and is expected to appear Monday in court in Brooklyn, where the Eastern District of New York is. So I thought, Kim, first of all, can you tell us who Tom Barrack is and his connection to Trump world?

Kimberly Atkins Stohr:

Yeah. So Tom Barrack is a private equity investor. He wants, upon a time, was a billionaire according to Forbes, although he hasn't appeared on that list in several years, but he has a lot of money still. And is a close friend of Donald Trump, which is how he got his job becoming an informal advisor to the Trump campaign, and then moving on to serve as chairman of the Presidential Inaugural Committee.

Kimberly Atkins Stohr:

And what he also seemed to be doing, starting the Trump campaign, was informally advising senior U.S government officials on issues related to U.S foreign policy in the Middle East. And this seems to be the subject of the investigation that led to this indictment. Essentially, he's being accused of using his status and his position as an advisor to the campaign and the administration to advance the the interests of, and provide intelligence to the UAE without notifying the attorney general of those actions and what he was doing.

Kimberly Atkins Stohr:

Generally speaking, speaking to foreign officials is not in itself illegal, but you have to register so that the federal government knows what you're doing, they know what your interests are, and they are aware of it and how that would affect policy. So he was trying to allegedly slide in and advance these interests of the UAE without taking the proper moves to inform the Justice Department. Which can be a big deal. You want the people who are working to advance the interest of the United States to actually be doing that and not be advancing the interests of other countries.

Barb McQuade:

Yeah. And, Joyce, can you help us understand these charges and maybe discuss how these charges differ from violations of the Foreign Agency Registration Act? I know I've heard, earlier in the week, some confusion between those two things. This is a different statute, 18 U.S.C. Section 951, make it a crime to act as a agent of a foreign government. What is this case all about and how does it differ from FARA?

Joyce Vance:

I think of those two statutes, FARA and 951, as cousins. They're related, but they're not exactly the same thing. 951, which is where we are in Barrack, should take everybody back to Maria Butina, a name from the Mueller investigation days. This is the woman who was ultimately charged with being a foreign agent, a Russian agent. And she was charged under 951.

Joyce Vance:

FARA involves the requirement that people who are acting on behalf of a foreign entity, it can be a government, but it could also be a political party, or an individual, or a business that operates overseas. Those folks have to register with the attorney general. And that makes a lot of sense when you think about it. The central purpose of FARA is to promote transparency by making sure that Americans understand when foreign entities are trying to bring their influence to bear on American public opinion.

Joyce Vance:

If you want to, perhaps, write an opinion piece in The Washington Post, talking about why Turkey is a great country, it might be important for Americans to know that the Turkish government or a Turkish political party is paying you money to do that rather than the fact that you're doing that out of your own personal sentiment. So that's what these laws are intended to do. Paul Manafort, Rick Gates, other people in Trump's orbit like Sam Patton and Elliott Broidy, all charged with FARA violation, some, obviously, now pardoned.

Joyce Vance:

Here's why 9 51 is different, though. It, too, criminalizes acting on behalf of a foreign government without disclosing your representation, but it uses some specialized definitions and it provides a 10-year maximum sentence for anyone who's not a diplomat or a consular official, people that we would expect to act on behalf of their government. Anyone other than that kind of folk who act in the United States as an agent of a foreign government without prior notification to the attorney general.

Joyce Vance:

I'm actually going to share the statutory definition of agent of a foreign government in 951, because I think that helps us understand what this statute is doing. That definition says, "An individual who agrees to operate within the United States, subject to the direction or the control of a foreign government or an official, has to register that relationship with the government."

Joyce Vance:

That is a much tighter relationship than the kind of people who can be prosecuted for FARA, which can really involve doing more PR work. We see that in 951, you are carrying out the objectives of a foreign government. And the best characterization of 951 that I've seen comes in a 2016 inspector general report. The inspector general at DOJ was trying to look at all of the national security division's

responsibilities. And they reflect in that report that the National Security Division described their obligation when they were enforcing 951 as espionage light.

Joyce Vance:

So people who are charged under 951, it's almost this James Bond-esk kind of behavior. It is very serious. And when you read this indictment, and as I continued to read through it, you can't avoid this sense of real concern that you have somebody, in this case, Barrack and his co-defendants, and they are influencing the highest levels of our government, not with a goal of doing what's best for Americans, but with a goal of doing what the Emiratis want done.

Joyce Vance:

That's what 951 criminalizes. Made worse, of course, as you've pointed out, by the fact that Barrack lies about it, apparently, obstructing with some connection to a grand jury. We don't know all the details there. And also lying to agents repeatedly when they questioned him about his conduct.

Barb McQuade:

Yeah. I think you make a good distinction there, Joyce, between FARA, which is a statute that gets used for lobbyists a failure to complete the paperwork and 951, which is used for spies, as you mentioned Maria Butina. And in this indictment, what they alleged did Barrack did was he sent officials in the UAE a draft of a Trump campaign speech on energy and allowed them to edit it.

Barb McQuade:

He wrote an op-ed in a national publication after he obtained the UAE's input for that op-ed. And he agreed to advocate for the appointment of individuals who were favorable to the UAE. These are presidential appointments, including a Congressman, a particular Congressman, as an ambassador. And he also took credit, I don't know if this really happened or not, but he took credit for getting the UAE excluded from president Trump's travel ban in January of 2017. I mean, this is like UAE calling the shots.

Kimberly Atkins Stohr:

Yeah. My favorite one is that he allegedly communicated with folks from the UAE about the UAS opposition to the summit on Camp David over that dispute in cutter. And Barrack allegedly sought to advise President Trump against holding that summit and it never happened. So he was clearly very deeply involved. And I do appreciate that distinction between FARA. I think I used the word registered. What I meant was notify. Let the DOJ knows that you can look into it.

Barb McQuade:

Yeah, yeah. No, and you're right. The elements of the statutes are really quite similar.

Kimberly Atkins Stohr:

Similar, but it's much more serious, which is probably one reason why, on Friday, his bail was set at \$250 million.

Barb McQuade:

Yeah. One of the things about that indictment, Kim, I wanted to ask you about is, it follows that typical DOJ convention by referring to uncharged individuals by giving them a label. So it includes references to

U.S person one, and Emiratis official two, and an unnamed Congressman, among others. And there's been some speculation in the press as to who those people are. I wouldn't to ask you to guess their identities, but do you think that the inclusion of these other people means that there may be more charges to come? And if so, what kinds of topics are prosecutors likely investigating?

Kimberly Atkins Stohr:

Yeah, I mean, the short answer is we don't know. Yes, we have seen cases where folks, including individual one have been named in various sorts of investigations. And it's really spurred the media to speculate about who those folks are, even if it might be the president of the United States. And at least some of those cases, that person was never charged with anything, was never actually named in these investigations.

Kimberly Atkins Stohr:

And so it was very.... I'm a little uncomfortable with playing the guessing game as to who may be involved. So I will just say not necessarily related to this, but we have seen a lot of other people who have either cooperated or who have been known to be a part of instances where there are investigations. There are folks like George Nader who turned into a cooperating witness, actually, in the Mueller investigation when that was happening.

Kimberly Atkins Stohr:

There's speculation about Emirati Crown Prince, Mohamed bin Zayed bin Sultan Al Nahyan, who he was involved in the inauguration proceedings and having meetings with representatives of the campaign. And then there is Erik Prince who was the brother of Betsy DeVos who has close ties with Russian investors and links to the Russian government.

Kimberly Atkins Stohr:

So these are examples of that. Again, we don't know. They haven't been named. We're not going to say that any of these folks are involved, but I think it shows that this could be, could be, we don't know, the beginning of a much broader investigation that could involve people who are cooperating, could involve other people who may be subjects of an investigation, which we might hear more in the future. I think this is just the beginning.

Kimberly Atkins Stohr:

Really, I mean, maybe, and I don't understand enough about this, but the bail amount, to me, really crystallized how big a deal and how important the government sees this investigation and in limiting Tom Barrack. He can only go from LA to New York and on under limited circumstances. He's unable to move money as an investor except in very small amounts. He has to wear a monitoring bracelet. They really are treating him like he is a very serious alleged defendant and who they are really worried that he might flee. So I think that this is a big... That made it seem like an even bigger deal than it already did.

Barb McQuade:

Yeah. So we've been looking at what might come next, looking back a little bit. Joyce, the events in this indictment ended in 2018. Why do you suppose the U.S attorney's office in the Eastern District of New York is only now getting around to charging it?

Joyce Vance:

There's been an awful lot of speculation that either Bill Barr or someone in the White House prevented this case from being indicted, but I actually have a different speculation. And it is just that speculation. We don't really know what went on here and what calculus was involved, but it seems clear that this case would have been ready to go much earlier than the point in time at which the indictment was actually unsealed.

Joyce Vance:

I suspect that prosecutors in Brooklyn were concerned that if they indicted this taste while that former guy was still in office, that he might have issued some pardons to keep this case from going forward. He had already pardoned his buddy, Broidy, he had already pardoned Manafort. I suspect that prosecutors simply made that hard-nosed calculation and decided to hold the indictment in hopes that it would have more survivability in the future. Do you think I have that right, Barbra? Have I become too cynical?

Barb McQuade:

Boy, I don't know. That is super interesting. Having never had to operate in that kind of environment where I worried about an unjust pardon, we usually work to bring a case as quickly as we reasonably could. In the federal system, we typically, in a case like this would have the luxury of taking as much time as you need it to make sure you heard from all the relevant witnesses and obtained all the documents you could obtain, working diligently, and then charging it when it was ready. It does seem quite cynical to think about waiting until the next administration so that you could avoid a pardon, but, boy, in light of the fact that all those people did get pardoned or have commutations of their sentences, it wouldn't be an irrational decision to do it.

Barb McQuade:

I also have wondered whether it was possible that the Eastern District of New York couldn't get approval from the leadership at DOJ. And that now that we have a new administration, the new leadership has approved it. So I'm not sure. I'm not sure what's going on. Sometimes it just takes that long. So there's also the less sinister reason behind all of that. That is a possibility.

Barb McQuade:

Well, let me ask just one last question. Kim, I'll direct this one to you. In some ways, the Trump campaign and the Trump administration could be seen as a victim of Barrack's alleged activities, that was that administration that was being lobbied for all of these things on behalf of the UAE, according to the indictment, how do you react to that? Characterization.

Kimberly Atkins Stohr:

No, I don't see it that way at all. Listen, this is what happens when you do know that the people who you put on your campaign team and the people that you have in and around the White House. This is what happens when you are a sloppy, this is what happens when you engage in cronyism and you pay, you use these positions as ways to give your friends a perk.

Kimberly Atkins Stohr:

Okay. If the Trump campaign and Trump administration didn't know what Barrack was allegedly doing, that's their own fault. So, no, I don't see them as victims of this. Not one iota. No.

Barb McQuade:

Grifters are going to grift.

Kimberly Atkins Stohr:

Exactly.

Barb McQuade:

Yeah. Is the label there. All right. Well, we'll keep an eye on that case as it develops. Hey, Kim, are you using any of those apps to meditate?

Kimberly Atkins Stohr:

I am because meditation is very important and I have been using Headspace. I find that it is really convenient. No matter where I am, when I'm out for a walk, or when I just have a few minutes in between meetings, I can go to the app and get in some meditation, whether it's a few minutes or half hour. And it's really effective in helping me sort of stay balanced with everything that's going on. What about you, Barb?

Barb McQuade:

Yeah. Headspace uses that guided meditation, which I really liked because most meditation I have tried before is all about breathing and focusing on breathing. Which doesn't work for me. Because when I start thinking about breathing, I become more anxious. I start worrying about, is that how I'm supposed to be breathing? What if I stopped breathing? If I stopped breathing, will I die?

Barb McQuade:

So much better for me is that Headspace has a lot of different choices for meditating, including just being mindful, thinking about observing what you're seeing. It's just taking a break from all of the things that can clutter our minds about work and family obligations and our to-do list and all those things. And I find just taking that break is as really refreshing.

Kimberly Atkins Stohr:

Yeah. I do, too. Headspace makes it easy to build a life-changing meditation practice with mindfulness that works for you anytime, anywhere, to give you a daily dose of guided mindfulness meditation in an easy-to-use app.

Barb McQuade:

Yeah. So if you're overwhelmed, you're having trouble falling asleep, you have wild kids. Headspace has a three-minute SOS meditation for you. Their approach can reduce stress, improve sleep, boost focus, and increase your overall sense of wellbeing. And it's one of the only mindfulness apps that is validated by clinical research.

Kimberly Atkins Stohr:

Headspace's benefits are even backed up by 25 published studies, 600,000 five-star reviews, and over 60 million downloads. You deserve to feel happier, and Headspace is meditation made simple. Just go to [headspace.com/sisters](https://www.headspace.com/sisters).

Barb McQuade:

That's [headspace.com/sisters](https://www.headspace.com/sisters) for a free one-month trial, with access to Headspace's full library of meditations for every situation. This is the best deal offered right now. So head to [headspace.com/sisters](https://www.headspace.com/sisters). Look for the link in our show notes.

Joyce Vance:

You guys made me want to try it. I haven't been using it. And as soon as we're done, I'm going to go do it. Well, this is a good opportunity for us to shift from talking about specifics of DOJ cases, actually, to talking about DOJ policy. Because this week we do have some policy news from DOJ. First off, Attorney General Merrick Garland issued a memo prohibiting the use of compulsory process to obtain information from or records of members of the news media. Barb, what exactly does that mean, compulsory process? And what is this policy about?

Barb McQuade:

Yeah. So compulsory process means a court authorized legal tool, like a grand jury subpoena, a court order, or a search warrant, even civil investigative demands which are used in civil cases similar to a grand jury subpoena. And the law requires different levels of court oversight, depending on the invasiveness of the tool. So to get, say, subscriber records, you can use a subpoena because it has very little oversight, but it's also not obtaining the most invasive things. It just tells you that this phone number belongs to Kimberly Atkins Store, for example.

Barb McQuade:

To get the content of email or text messages, you have to get a search warrant. And that means a court has made a finding of probable cause and approve that search warrant. That's a great level of oversight because the content of your communications is seen as very invasive. And then there's something in between. You can get a court order to get just the call record. So to see the records of maybe who Kim called in the past month. I can get that with a court order. And it's a slightly lesser standard than is required for a search warrant. I just have to show that it's a relevant and material to an authorized investigation.

Barb McQuade:

It's called compulsory because a failure to comply with those requests from a prosecutor can result in jailing for contempt. And so, in that way, if a member of the news media has asked for those records, there's no privilege that allows them to say, hey, I'm a reporter, hands-off, they must produce those just like anyone else. There's some case law from the Supreme Court that says the government is entitled to every man's evidence, every person's evidence. And that includes reporters who may disregard those orders only at their peril and the peril of being jailed.

Joyce Vance:

Well, Barb, you wrote a great piece on this memo for [cafe.com](https://www.cafe.com) this week. And that piece will be posted along with our show notes. I really appreciated some of the distinctions that you drew. Do you think this policy makes sense from DOJ's point of view? Does it achieve the First Amendment goals that are so very important to Merrick Garland? And will it, in your judgment, prevent prosecutors from doing any necessary work?

Barb McQuade:

Well, this is a very strong stand in favor of the first amendment, much stronger than even the stand that president Obama and Eric Holder took in the last administration. One of the great challenges in national security law is the tension between protecting public safety on the one hand and protecting our civil liberties, like free press and transparency in government. So this policy takes a look at that balance and makes a very strong defense of that right to a free press.

Barb McQuade:

And Merrick Garland made public remarks at the time of authorizing this policy about the importance of a free press in a democracy. If we are to be self-governed, we need to be able to discover what our government is doing and to make informed choices when we cast our ballots to elect an administration. And so for that reason he has set that line between those two competing tensions, much closer to the line of First Amendment free press freedom than any of his predecessors.

Barb McQuade:

It does, however, have some important exceptions. And that's what I wrote about, is we have to have some exceptions. Like all rights in our bill of rights, all of these rights come with some exceptions and these rights are not absolute. They are subject to reasonableness. And there are exceptions that I think will cover most situations where there is a dire need. For example, prosecutors may use compulsory process even against reporters, if there is risk of death or great bodily injury. Or were agents of a foreign power are involved.

Barb McQuade:

It also permits the prosecutors to obtain the records from the other side of the communication equation, the potential leakers. And those really are the wrong doors here. Government employees who have provided classified or sensitive information to a reporter who agreed, as a condition of their employment, to safeguard the nation's secrets. So the prosecutors can look from that end.

Barb McQuade:

Now, I think there will be, however, some instances where you read about a leak in the newspaper, you may know that this reporter got that information, but it may be impossible to ascertain who their source was. I think there will be some instances where prosecutors will be unable to successfully investigate a leak, but that is the policy choice. That is the give and take that Merrick Garland has made here.

Joyce Vance:

Merrick Garland, the attorney general, seems to be remarkably consistent with Merrick Garland, the judge, a strong puppy proponent of first amendment rights. I think he's been very consistent in that regard. So, Kim, as you viewed this, how does it look to you as a member of the media? And remind us about the revelations about how DOJ used compulsory process during the Trump administration against journalists. Do you think that this policy, looking at it with your journalistic hat on, strikes the correct balance?

Kimberly Atkins Stohr:

I think it does. I think it does. And yes, this comes after the Trump administration, as we've learned in recent weeks, use subpoenas and other compulsory processes to go after journalists because they were

angry about what they were reporting. It was part of this "leak investigation" into the disclosure of information, frankly, that the White House didn't like.

Kimberly Atkins Stohr:

And let's be really clear here. It is illegal to disclose sensitive or classified information. It certainly is illegal and problematic to disclose information that could be a threat to national security for example. But these are the sort of things that the folks at the Washington Post, and the New York Times, and CNN who found out that they were the subject of these compulsory processes were doing.

Kimberly Atkins Stohr:

What they were doing was their job. And the White House was unhappy about it. And there were a lot of people within the White House that were leaking, that disclosing information that was happening, but it did not clearly rise to a level of illegality here. And that is what Mira Garland is really saying now. That isn't essentially an abuse of the Department of Justice. And it has a very dangerous and chilling effect, or could have a very dangerous and chilling effect on the free press.

Kimberly Atkins Stohr:

Of course, big outfits like the Washington Post have the resources to fight against this sort of stuff, but if you are another news organization and you don't have those resources. What essentially the White House was hoping was that it would scare them and they would stop. And they would stop doing their job. And the press is the only industry that has explicit protection in the bill of rights. And it's because it serves as a really important check on the government and to make sure that the public is aware of what is happening. And that is something that it seems Merrick, Garland is making very clear here.

Joyce Vance:

Yeah. I think Barb's point is a good one that prosecutors may be hampered in leak investigations in some limited cases. But I tend to be more on your side of the equation here. If err going to air on one side or the other here, I'd rather err on giving the press a little bit too much freedom, especially as we saw this used, as you say, literally. It was sort of a tit for tat situation, right?

Joyce Vance:

One of the stories that the White House didn't like the reporting on was that then Senator Jeff Sessions had had conversations with the Russian Ambassador Kislyak. I think either at the convention or at some events around the Republican Convention. And the White House was unhappy about that reporting, which is simply a legitimate journalistic endeavor. So trying to crack down on that seems so oppositional to the first amendment and what we're supposed to have in this country.

Joyce Vance:

And as Barb points out, Kim, there are a lot of exceptions here. Under this policy, DOJ can still seek information from journalists if they're engaged in criminal conduct that falls outside of their journalistic role, if there's an imminent threat, whatever imminent threat means, involved in the situation, if you have foreign agents pretending to be journalists, hey, RT, how are you guys doing? And also if you have a journalist who's agreed to accept a subpoena. Are you worried at all that the exceptions in this policy are so broad that they can swallow the rule?

Kimberly Atkins Stohr:

No, I think this gets right to the idea that it does strike the right balance. I've been a journalist for 20 years and I have never been even close to being in danger of doing any of the things that would fall within one of these exceptions. It is really easy to be a good and thorough journalist and not accidentally join a terrorist organization and start working on their behalf or do something that is patently illegal or that threatens national security.

Kimberly Atkins Stohr:

These are the sorts of things that you need to have. You don't want ISIS developing some sort of American-based news organization and trying to get around a rule by claiming that they're a member of the press. Of course, you don't. And so I think that these strike, as I said, just the right balance. Protecting national security is important. Protecting the safety of Americans is important. And you can do that and protect the free press at the same time.

Joyce Vance:

I think that's a really helpful assessment. Because, often, you see policies written in the government where it looks like a great policy, and then there's sort of an exception for anything that might come up down the road that we haven't thought of here, that lets you violate the policy. And that that exception is going to swamp the rule.

Joyce Vance:

But here, Garland does seem very serious. So my last question about this policy, and then we'll move on to the second policy is for you, Barb. Because this is a policy, it does not have the full force of law. Given that, do you think Garland is serious about the policy and do you think he can make it stick after he's gone?

Barb McQuade:

I think Garland is very serious about the policy. And I think as long as he's there, and as long as President Biden is in office, who has also said that he would absolutely not use compulsory process to get records from journalists, I think that this policy will stick. But making it stick long-term, a new administration can very abruptly change this with the stroke of a pen. So I think the only way to enshrine this in the law would be to make it a statute, a law that Congress passes.

Barb McQuade:

That can get tricky, though. We do have laws that restrict the ability of the executive branch to get records. As I mentioned, there are statutes that talk about going from subpoena to court order to search warrant as the invasiveness increases. Those tend to reflect the Supreme court's jurisprudence when it comes to fourth amendment search and seizure law. So it would require a balancing of First Amendment rights, Fourth Amendment privacy concerns, and the separation of power concerns between the legislative and the executive branches. The Justice Department does have a lot of inherent authority as part of the executive branch to execute the laws.

Barb McQuade:

So it would be tricky, but I think, perhaps, worthwhile to try to develop a statute that might strike that right balance. And I think it is a good one to have very strong protections for journalists, but to include

some exceptions. And you could have a judge oversee these decisions about whether it's appropriate in certain circumstances for these exceptions. So it's a good start, but I don't know how long lasting it will be after the Biden administration is over.

Joyce Vance:

Well, Garland has called for legislative action. We'll have to wait and see if Congress has any appetite. But let's turn to the other big policy from DOJ this week. We have talked a lot about the appropriate scope of communications between the White House and people at DOJ and who gets to talk to each other and what they can talk about. And lo and behold, this week, we finally got a little bit of policy in this area. So, Kim, can you explain this new guidance and what it requires executive branch employees to do?

Kimberly Atkins Stohr:

Yes. So, essentially, I like to think of this as part of the anti-lock her up doctrine. What we really don't want in government is to have the White House calling for investigations of people, calling for prosecutions of people, political enemies. Or even, otherwise, you want the DOJ to operate independently and to have the facts and the law lead those investigations.

Kimberly Atkins Stohr:

So this guidance, I will read what Garland wrote in the memo himself. He said, "The Justice Department will not advise the White House concerning pending or contemplated criminal or civil law enforcement investigations or cases, unless doing so is important for the performance of the president's duties and appropriate from a law enforcement perspective."

Kimberly Atkins Stohr:

Basically, it's saying, when it comes to communicating about what the Justice Department is doing in terms of its investigation, it really should be out of the hands of, and really out of communication of the White House. It's not the White House's job, it is federal prosecutor's job. And it's to protect the integrity of these investigations. And again, it is in reaction to what we saw in the previous administration. So it's another...

Kimberly Atkins Stohr:

The Boston Editorial Board did a series about future-proofing the presidency, all the reforms that are necessary after we've learned from the Trump administration, which needed to be put in place to prevent what happened from happening again. And I think this is something that falls squarely within that type of topic.

Joyce Vance:

Well, Barb, this is certainly something new coming out of the Trump administration, but is it actually something new? And what do you make of the policy?

Barb McQuade:

This is actually the type of guidance that every administration has issued since the post-Watergate era, when some of these reforms were put into place. These are the things sometimes referred to as norms. They're not laws, but their policies in an effort to improve integrity and public confidence in

government. And even the Trump administration had one of these. Though, I will say that this one is much longer and more detailed than I have seen in the past. I think the one that governed us, Joyce, was maybe three pages long was one is like 12 pages long. It has a lot of detail about how it's supposed to work and exceptions and other things.

Barb McQuade:

But one of the things that we saw is, during the Trump administration, even though they had this rule that communications were supposed to go only through the attorney general and the deputy attorney general to White House counsel to protect the integrity investigations. And there are times when the White House needs to know about a criminal case. If you're about to indict a major terrorist or someone that's going to have an impact on state department diplomacy, it's really important that the highest levels of the government know about that. But as Kim said, what you don't want is the president saying, I direct you to indict my enemy.

Barb McQuade:

So it allows for these communications, but only in these very limited circumstances and only at the highest levels. But as we saw in the Trump administration, even though they had this policy, it was not what they did in practice. There's been reporting recently about a push from people in the White House to DOJ, urging them to investigate election fraud, for example, in the 2020 election.

Barb McQuade:

And so I think it's a good reminder that at the end of the day, policies are only as good as the people who are enforcing them. And so it's good to have these policies. Be careful who you elect. You need to have people of integrity doing these jobs. And perhaps it is worthwhile for Congress to explore a law that makes it a crime to prevent communications between parts of the executive branch.

Barb McQuade:

Although, once again, I think separation of powers concerns could make it difficult for the legislature to tell one part of the executive branch it can't talk to another part of the executive branch. At the end of the day, all of these jobs are handled by humans. It's good to have guardrails in place to prevent people from going off track and doing things that are not appropriate. But at the end of the day, we need to trust people of integrity to run our government.

Kimberly Atkins Stohr:

Just to be clear, isn't it...? Yes, there was a policy in place during the Trump administration, but I believe that was written by Eric Holder and they just [crosstalk 01:02:17].

Joyce Vance:

It was our policy... It was Obama [crosstalk 01:02:20].

Barb McQuade:

Certainly, Jeff Sessions-

Kimberly Atkins Stohr:

It was sort of like the way that Melania Trump gave her convention speech by just changing the names in Michelle Obama speech.

Barb McQuade:

But she said she [crosstalk 01:02:33].

Joyce Vance:

But not quite as effective when all was said and done. I think, all joking aside, Barb is dead on the money. To a large extent, we have to rely on the integrity of the people who are doing their jobs in government and their willingness to uphold their oath of office. Bottom line is, elections matter.

Barb McQuade:

Hey, Joyce, are you still using HelloFresh?

Joyce Vance:

We are. My husband and I split cooking during the week. And Bob really hates having to decide what he's going to make and hates having to answer the question, what am I going to make when I get home from work? So he loves having HelloFresh on hand. He's been ordering every week. And when it's his night to cook, he cooks the meals. And the great thing about them, we've got kids, even our grown ones who float in and out of the house for dinner. Everybody likes the meals. And on Jill's recommendation, we tried the Barramundi for the first time, one of the fish dishes. And it was fantastic. How about you Barb?

Barb McQuade:

Yeah, I love the Barramundi, too. I think that's my favorite of the HelloFresh meals. I've been ordering in and we make it every week in our house. We get twice a week. And it may stun you, but I'm not much of a cook. And I find that we eat really healthy. It's easy.

Barb McQuade:

And I love it that all the ingredients are right there with instructions. It's like those manuals that used to be for dummies, like doing your taxes for dummies or whatever it is. This is that version. It's got nice big pictures. And it's got just descriptions of what you're doing. I've even learned what it means to zest a lemon, which I did not previously know, because they told me in HelloFresh. So yeah, I'm I'm enjoying it very much. Kim, how about you?

Kimberly Atkins Stohr:

I am as well. One thing that I'm really impressed by it is the fact that their ingredients are always come so fresh. I'm a stickler for fresh ingredients, and they are really beautiful-looking pieces of produce. And the meat is always a nice and well packaged. And I love the tacos. They were a big hit in my household. And that's one of my favorite so far.

Barb McQuade:

HelloFresh offers 50 menu and market items each week, including ready-to-eat salads, sandwiches, and soups, all created and tested by professional chefs and nutritional experts to ensure taste and simplicity.

It's super convenient. With HelloFresh, you have the flexibility you need to easily customize your order on the app within minutes.

Kimberly Atkins Stohr:

They have something for everyone, all made with quality fresh ingredients, sourced directly from growers and delivered from the farm, right to your front door.

Joyce Vance:

Go to hellofresh.com/sisters14, and use code "sisters14" to get up to 14 free meals plus free shipping. You too can learn how to zest a lemon like Barb McQuade.

Barb McQuade:

That's hellofresh.com/sisters14. That sisters14. And use code "sisters14" to get up to 14 free meals plus free shipping. HelloFresh, America's number one meal kit. Look for the link in our show notes.

Joyce Vance:

As always, we've received some great listener questions this week. If you have a question for us, please email us at sistersinlaw@politicon.com, or tweet using #SistersInLaw. If we don't get to your question during the show, keep an eye on our Twitter feeds throughout the week where we'll answer as many of your questions as we can.

Joyce Vance:

Our first question this week comes from Melissa. Can Justice Kavanaugh be re-investigated or removed after the recent revelations? This is of course, the stories that have surfaced this week, that in response to a letter from senators, White House and goons, the FBI has indicated that they didn't follow up on the 4,500 tips that came off of their tip line, except for about 10 of them.

Barb McQuade:

Yeah. And most of those were referred to the White House counsel. And that's clearly problematic. When we were watching that in real-time, I'm sure many of us thought that that supplemental FBI investigation meant something different than that. And I've gotten this question a lot on Twitter, as well. The answer is, can it be reinvested, gated, or removed? Doubtful. Very unlikely.

Barb McQuade:

The only way that a confirmed Supreme Court justice can be removed from that position is through the impeachment process. We have seen the impeachment process play out a couple of times in recent years, and you see what a high bar that is. And I honestly don't think that there is probably appetite in Congress to even begin that kind of proceeding.

Barb McQuade:

So I think in bringing this up in this revelation and the statements that Dr. Blasey Ford's attorneys are making, the goal of that, most likely, is to ensure to seek some reforms within the FBI in how they conduct investigation and to bring some daylight there so something like that doesn't happen again. But I don't think the end game is certainly is trying to remove Brett Kavanaugh from his office.

Joyce Vance:

Although that may be a disappointing answer to a lot of our listeners, I think it is interesting to think about reforming the process. Because right now, in these investigations, this isn't like a criminal investigation or a national security investigation. The FBI is treating the White House as its client. Providing the White House with information on a nominee and letting the White House decide what to do to it.

Joyce Vance:

But, really, Congress has a vested interest here. People in the Senate have to vote on whether to confirm these folks. It seems like they're also entitled to some accountability from FBI. So if nothing else, perhaps, this helps to reform that process. We've got a great legal vocabulary builder question this week from Rich in Oregon. Barb, this question is for you. Rich writes, "In Barb McQuade's peace on the crack and lawyers, you used the term probative. Could you define for the audience what this means?"

Barb McQuade:

Yes. So I looked back at the piece I wrote in MSNBC, and the point I was making was that Judge Linda Parker in this hearing regarding sanctions against the lawyers who brought what she deemed a frivolous lawsuit in Michigan challenging the results of the 2020 election. She said that the affidavits that were submitted in support of the complaint had no probative value.

Barb McQuade:

And so what does that mean? Probative means having the tendency to prove that some facts is true. And the point she was making is that even if these affidavits are all true, they don't really mean anything. They said things like, I believe votes were changed, or I was perplexed by what I saw, or a plastic bag may have contained ballots. And she said, there wasn't anything probative about that because people weren't really alleging any specific facts. They were just sort of speculating. And so probative means something that tends to prove some fact.

Kimberly Atkins Stohr:

I never liked that word. I think it's because I don't like the word probe. Just it bugs me.

Joyce Vance:

Our final question is from Julia. She asks, should the Department of Justice pursue sedition charges against Trump? Well thanks, Julia, for a very loaded question, but one that really we're all thinking about these days, right? Will there ever be any accountability for the former president and people close to him? And a theme that we've stressed a lot is the importance of not letting Trump draw us off of our position that we are a rule of law country and that we protect everyone's rights, whether we liked their conduct or not.

Joyce Vance:

So in answering this question, I'm going to Dodge a little bit and I'm going to not answer the question directly, but I'm going to talk about the standard that should be used and say that this investigation, if in fact there is one underway should be conducted just like any other investigation in a criminal case. And prosecutors should only charge sedition if they, at the end of their investigation, find that they have

sufficient evidence to obtain a conviction at trial, proof beyond a reasonable doubt, and sufficient evidence to sustain it on appeal. That means no legal problems with the conviction.

Joyce Vance:

And so the biggest issue that prosecutors, if they believe they have enough evidence in a sedition case would have to deal with, is whether there's a First Amendment barrier to prosecuting for a sedition here. And you may recall from some of our earlier discussions that there's an old Ohio case, Brandenburg involving a KKK individual who's trying to exhort a group to take activity. And the issue in incitement to sedition is whether the person has the immediate opportunity to create violence.

Joyce Vance:

So that might seem pretty obvious to all of us who watched events unfold on January 6th, but there are technical legal standards that have to be met here. And that's really not something to blow by. So prosecutors will have to be meticulous and very sensitive in putting evidence together.

Joyce Vance:

I don't have a strong feeling one way or the other, Barb or Kim may, about how this will come out. Although, at some sense, it seems so obvious that the former president was involved in sedition. I think that's a judgment, frankly, for the court of public opinion. On technical legal terms, we're going to have to wait and see what the prosecutors do. Okay. Nobody else is going to back me up on that one.

Barb McQuade:

No, I'll chime in if you want. I'll say something. I would be very surprised to see Donald Trump charged with sedition. Criminal prosecution is not for gray areas. This would really be a gray area. And that is because he used a lot of wiggle words when he was talking to his supporters. He, I think, could argue that his intent was simply to express his political view about what was going on. I don't share it. I don't buy it. I think he was trying to rile them up. They talked about things like fighting like hell or you're not going to have a country anymore.

Barb McQuade:

But in light of that Brandenburg standard of an intent to incite and a reasonable likelihood that you would incite people to violence, I think is a very high standard and a public official giving a political speech. I think, unless you are handing out the pitchforks and saying I direct you to charge up the hill, I think it is very likely that prosecutors would file those charges.

Joyce Vance:

I really agree with that. It's important to remember that the tie does not go to the Justice Department in these cases, right? DOJ has got to prove with evidence that will hold up beyond a reasonable doubt. Whether we like it or not, that's a tough standard. And, Barb, you're dead on the money, like you always are, when you say that prosecutions don't go into gray areas, you can never get at that beyond a reasonable doubt.

Barb McQuade:

You know where was the appropriate place to hold him accountable? Impeachment. Impeachment.

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Joyce Vance:

Impeachment. Absolutely. And at the ballot box, though. So I think, do credit to everybody who fought through all the crazy and went out and voted. Because, ultimately, it was voters who brought some measure of accountability for the former president.

Joyce Vance:

Well, thank you for listening to #SistersInLaw with Kimberly Atkins Stohr, Barb McQuade, and me, Joyce Vance. Jill will be back with us next week. Don't forget to send in your questions by email to sistersinlaw@politicon.com, or tweet them for next week show using #SistersInLaw.

Joyce Vance:

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Joyce Vance:

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Barb McQuade:

I think she's violating her Noom diet eating Memphis barbecue.

Kimberly Atkins Stohr:

That's not a violation. Noom is about choices.

Joyce Vance:

I had texted her last night to say make sure that you guys go and have lunch at The Beauty Shop, which is this like the old beehive hairdryers that you can get under and everything. And she texted back and she said, "Oh, we've got a reservation. We can't wait to go." I'm so jealous.

Kimberly Atkins Stohr:

Oh, that's great.

Joyce Vance:

I bet they're having a blast.

Barb McQuade:

I thought they're. It's well-deserved.[crosstalk 01:16:02].

Joyce Vance:

So this has left the building.